IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION,
et al.,
Petitioners,

-v.-

JO CAROL LA FLEUR,
et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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PETITION FOR A WRIT OF CERTIORARI FILED
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Rules

MISCELLANEOUS

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CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 465 F.2d. 1184. The opinion of the District Court is reported in 326 F. Supp. 1208 (N.D. Ohio-1971). Both opinions are reproduced in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on July 27, 1972. A motion for a rehearing and suggestion for a hearing *en banc* was denied on August 29, 1972. The Petition for a Writ of Certiorari was filed November 27, 1972 and granted April 23, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is U.S. CONST. amend. XIV. § 1

> ". . . . ; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

I

Mindful of Rule 40 1(d) of the rules of this Court, petitioners do not now ask to raise additional questions or change the substance of the question already presented in the Petition for Certiorari, but it is crucial to point out that since the Petition for Certiorari was filed in this case, two decisions have been rendered by this Court which bear upon the issue here. These are *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1273 (1973), decided March 23, 1973, and *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973), decided May 14, 1973.

Rodriguez holds that in determining the constitutionality of challenged state classification in the field of educational policy the traditional standard of review under the equal protection clause of the Fourteenth Amendment shall be applied, *viz.*—does that classification bear a rational relationship, in both its object and the means of its execution, to a legitimate state purpose?

While *Frontiero* rests on no majority opinion, four of the justices of this Court there agreed that a challenged federal classification based upon sex alone was inherently suspect, hence its constitutional validity (under the Fifth Amendment equivalent of Fourteenth Amendment Equal Protection) must be judged, not by the traditional standard applied in *Rodriguez*, but by the doctrine of strict judicial

scrutiny heretofore reserved to classifications based on race, national origin, alienage, indigency, or illegitimacy.

The case at bar presents to this Court a classification which the Court of Appeals treated as based on sex alone, as in *Frontiero*, but in a *Rodriguez* situation. The question in this case is whether, in determining the constitutionality of a challenged state classification in the field of educational policy, *viz.*—a mandatory maternity leave regulation for pregnant school teachers, should this Court apply the *Rodriguez*-approved traditional standard of review under the Equal Protection Clause or does *Frontiero* demand strict judicial scrutiny? A related question is whether a classification that is limited in its application to pregnant female school teachers is based on sex alone or is based on the condition of pregnancy alone.

II

Implicit in the above are the further questions of whether the challenged state classification satisfies the *Rodriguez* criterion of traditional review, if it be so applied, or, if that be deemed by this Court not the applicable standard, whether the classification based on the record here under review satisfies *Frontiero's* strict judicial scrutiny, since here, unlike the position of the school board in *Rodriguez* before this Court, petitioners contend that the challenged state classification satisfies either or both criteria.

STATEMENT OF THE CASE

A. The Challenged Rule

Respondents, at the time of filing their complaints, were two married pregnant school teachers. They complained of a rule of the Cleveland School Board which required them to take a mandatory maternity leave at the

beginning of their fifth month of pregnancy and not return until the first semester following the birth of their babies.[1] The complaints asserted that the Cleveland School Board rule violated complainants' constitutional and statutory civil rights. Jurisdiction of the District Court was asserted under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), 28 U.S.C. § 1343(3) and (4) (1970) and the

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[1] The rule, in its entirety, reads as follows:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"APPLICATION. A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence.* A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years.*

"REASSIGNMENT. A teacher may return to service from maternity leaves not earlier than the *beginning of the* regular school semester which follows the child's age of *three (3) months.* In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written* request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"*A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal.*" (emphasis in original) (A. 54-55).

Equal Protection Clause of the Fourteenth Amendment. The two cases were tried together.

After a full hearing, the District Court found that there was "a reasonable basis for the rule", and that respondents had not shown that the rule was arbitrary or unreasonable. At no time since have respondents contended that the findings of fact of the District Court were "clearly erroneous" within the meaning of Rule 52 of the Rules of Civil Procedure.

B. The Environment In Which The Rule Is Applied

The evidence before the court showed that the rule was some twenty years old. (A. 55, 187). While its origins were somewhat obscure (A. 187-188), it was clear, under the evidence, that it had continued to be enforced because of the felt necessity of having able-bodied teachers presiding over classrooms. (A. 207, 215, 133, 189-190, 152). Children today, nurtured, as the evidence shows, by the violence of television programs and their reactions to the world around them (A. 152), must be taught by able-bodied, vigorous teachers. (A. 207, 210-212). The medical evidence of the defendant Board established that a pregnant school teacher, after four months of pregnancy, is not the able-bodied person that she was before. (A. 126-130). She cannot cope with the daily problems of teaching in a great urban school system as well as she could before her pregnancy. (A. 130). Her weight increases 15 or 20 pounds, her center of gravity shifts, she must urinate more frequently, she experiences the three classic fears of pregnancy—miscarriage, agony in labor, and a deformed child. (A. 129-130). Her pregnancy in the environment in which she finds herself, full of active, demanding, disrespectful and, indeed, sometimes jeering young people (A. 188), affects her ability to teach. (A. 130, 188). Putting aside the effect of the disorders, discomforts, and complications of pregnancy *upon her* as not relevant to the issues in

this case, those disorders, discomforts and complications affect, according to the expert evidence in this case, *her ability to perform her teaching tasks.* (A. 130-134). She is no longer able-bodied *in the classroom.* (A. 128, 132-133). The evidence on these points is substantially uncontradicted, even by the obstetrician of one of the plaintiffs. (A. 113).

This is not to say, nor does the evidence attempt to establish, that the environment of today's teacher in a great urban school system in America is as dismal as that portrayed in the Blackboard Jungle, but the environment demands a healthy, active, able-bodied person. For example, the evidence showed that during the school year 1969-1970 there were 256 assaults by students on Cleveland teachers, or more than one every school day. (A. 207). Forty-six guns and eighteen knives were confiscated from students in the Cleveland school system during the academic year 1970-1971 (A. 208), and 136 teachers were injured in school accidents in 1969. (A. 210). Forty-one of those accidents were falls. (A. 210). The plaintiffs in the case at bar admitted to witnessing fights both within and without their classrooms during their limited teaching experience. (A. 71-72, 92, 93). In addition to being on their feet in the classrooms, teachers are required to maintain order in hallways, recreation areas, cafeterias, and study halls. (A. 211).

A pregnant teacher is not an unusual phenomenon in the Cleveland School System. While the Cleveland Board of Education employs some 5,859 teachers, 64 per cent of them are female and 50 per cent of the females are of child-bearing age. (A. 209). Approximately 255 teachers are on maternity leave of absence at any given moment in the school year. (A. 231).

Plaintiff Nelson testified that she had had between three and four student fights in her classroom in the seven months she had been teaching. (A. 71-72). Plaintiff La-

Fleur admitted to "problems of discipline" at her junior high school in the city. (A. 93). Mrs. Nelson admitted that four teachers in her junior high school had been assaulted in that year alone. (A. 72). A distinguished woman psychologist, Dr. Jane Kessler, called to testify on behalf of plaintiffs, confirmed on cross-examination that the incidence of violence is increasing in today's schools and that the classroom today is a more dangerous place for the teacher than it was ten years ago. (A. 153).

C. The Medical Evidence Established, Without Dispute, That a Pregnant School Teacher Is Not as Able-Bodied As a Non-Pregnant School Teacher.

The medical testimony upon which the defendant Board relied was largely that of William C. Weir. A Harvard Medical School graduate and a member of the faculty of Obstetrics and Gynecology at the Case Western Reserve University Medical School for 35 years, Dr. Weir is one of Cleveland's most distinguished obstetricians. (A. 120,122). In addition to numerous publications and medical papers in the field of pregnancy, he is a founding fellow of the American College of Obstetrics and Gynecology, a diplomate of the American Board of Obstetrics and Gynecology, and for 20 years Chief Gynecological Consultant of the Maternal Health Association's Infertility Clinic in Cleveland. (A. 123, 124).

Dr. Weir, who has delivered some 4,000 children in 20 years of active obstetrical practice (A. 123), testified that the incidence of fetal loss, by miscarriage or spontaneous abortion, ranged as high as 13-20 per cent in all pregnancies and that only 60-70 per cent of pregnancies can be considered "entirely normal" (A. 135). Against this background of potential fetal loss under normal circumstances, Dr. Weir testified that placing the pregnant mother in an environment conducive to physical accident or vio-

lence, or even fear of violence, could not help but have a deleterious effect on the chances for a normal pregnancy. (A. 134).

Dr. Weir also testified that the psychological effect of pregnancy upon all mothers predictably gives rise to three classic fears: fear of miscarriage, fear of difficulty in labor, and fear of abnormalities in the child (A. 129). He stated that the wholly understandable, protective "fears" of the pregnant teacher would further inhibit her in an environment with potential for violence, and, for this reason, the pregnant teacher "would not be able to fulfill her duties as well as if she were not pregnant." (A. 130).

Medical complications which can be expected with each stage of pregnancy were detailed at length by Dr. Weir.[2] He testified that obstetrical practice is to divide the nine-month period of pregnancy into three "trimesters," the first trimester covering months one through three of pregnancy, the second trimester, months four through six, and the third, months seven through nine (A. 124-127). Complications of the second trimester include spontaneous labor and prematurity, toxemia of pregnancy (with resultant high blood pressure or convulsions), partial placenta previa and complete placenta previa (A. 126-127). Toxemia of pregnancy, a major cause of maternal and fetal deaths, can develop "very suddenly" (A. 138); its incidence varies between the socio-economic groups, with instances as high as 10 per cent noted in one Cleveland hospital (A. 126). Partial or complete placenta previa, where portions of the placenta cover the lower opening of the cervix resulting in

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[2] To demonstrate, in the manner of Mr. Justice Brandeis while yet a barrister before this Court (see *Muller vs. Oregon*, 208 U.S. 412, 419-421), that Dr. Weir's testimony represents the consensus of medical expertise, a "*Catalogue and Bibliography of Disorders, Discomforts and Complications of Pregnancy*" is appended following the Conclusion of this brief as Exhibit A.

hemorrhaging, a very serious medical complication which can result in death, occurs in one to two per cent of the population (A. 127).

The complications of the third trimester of pregnancy were detailed by Dr. Weir (A. 127-129). During this time the normally pregnant woman has gained from 15 to 20 pounds (A. 124). Her mobility is considerably reduced (A. 128). Her whole center of gravity changes, her shoulders are further back and she is subject to more backaches, and due to the weight increase she is much more awkward and cannot move around as quickly as she could before (A. 128). Because of the increase in the size of the fetus, there is an increased pressure on the bladder and the frequency of urination increases (A. 128). The possibilities of a premature baby occurring spontaneously increase (A. 128). Problems of toxemia of pregnancy and placenta previa become more acute in the third trimester. (A. 128).

Fears of assault while in the performance of her duties would prevent the expectant mother from fulfilling her duties as well as if she were not pregnant (A. 130). Any sudden violent physical exertion can cause a premature separation of the placenta (A. 130); even a shoving or pushing of a teacher in the third trimester of pregnancy could cause a premature separation of the placenta (A. 131).

Dr. Weir testified that medical science itself makes a distinction about the time when the Cleveland maternity leave rule goes into effect (beginning of fifth month); medically and legally, loss of the fetus before the end of the fifth month is termed a "miscarriage," but fetal loss after the end of the fifth month is a "still birth," requiring doctor's certification (A. 125).

Dr. Weir testified that in his opinion, based upon his varied experience and expertise in obstetrics, the Cleveland regulation requiring maternity leave from five months

before the expected date of birth to the start of the regular school semester following the child's age of three months, particularly in view of the teacher-assault statistics, was "a very reasonable rule" (A. 133). He stated that "certainly as pregnancy goes along the chance of injury and the increased worries I feel would increase the complications of pregnancy to a certain extent." (A. 134).

On cross-examination, asked if he would advise a patient teaching at a Cleveland inner-city school to stop working, Dr. Weir testified "under the present circumstances I think it would probably be a wise idea to tell them they are taking increased chances" (A. 136).

Plaintiffs offered no evidence to rebut this testimony on the effects of pregnancy, especially in the inner-city school environment. Indeed, Plaintiff Nelson's doctor admitted, on cross-examination, that certain medical problems occur in normal pregnant women having normal pregnancies (A. 111). He admitted that these problems (a) include weight gains of 15 to 20 pounds (A. 111), (b) shifts in the center of gravity (A. 111), (c) increase in the frequency of urination (A. 111-112), (d) require a high protein diet (A. 112), and (e) impair the pregnant teacher's ability to engage in physical activity (A. 113). Plaintiff's obstetrician also confirmed the seriousness of placenta previa and toxemia of pregnancy and admitted that placenta previa could be induced by sudden quick physical exertion. (A. 113).

Plaintiffs introduced, by deposition, the testimony of a second obstetrician who conceded that in her own hospital pregnant nurses, by unwritten rule, usually took leave "about the seventh month" or "sooner, depending on the doctor" (even in a situation where full hospital emergency facilities were available instantly to them) (A. 176). The doctor testified that she advised people to continue working on an individual basis, while allowing that strenuous or sudden physical exertion could have an

effect on pregnancy (A. 176) and that her knowledge of conditions in the Cleveland schools was nil (A. 175-176).

D. The Undisputed Evidence Established The Administrative Necessity for The Rule.

The origin of the mandatory maternity leave rule was explained by Dr. Mark C. Schinnerer, who was Superintendent of the Cleveland City School District at the time of the rule's adoption in 1952 (A. 184). Dr. Schinnerer was an administrator for the Cleveland schools from 1923 until his retirement in 1961, and for 14 years its Superintendent (A. 184). Thereafter he served three terms in the Ohio House of Representatives, was Chairman of the House Education Committee, served as special consultant to the United States Office of Education and the New York City and Los Angeles school systems, and is a past chairman of the United States Conference of Large City School Superintendents (A. 182-85).

Dr. Schinnerer testified that he recommended the rule to the Board of Education for several reasons. Prior to the rule a patchwork, inconsistent practice prevailed whereby some teachers agreed to take maternity leave and some did not (A. 194). Some teachers took decided advantage of the lack of a rule and came "awfully close a few times" to having a child "born in the classroom" (A. 196). In addition, "very embarrassing situations" had developed where pregnant teachers had been "subjected to humiliations, indignities on the part of pupils," which were "disruptive of the classroom" (A. 188) and resulted in "consequent interruption, interference with the classroom activity" (A. 192).

Based on his extensive experience in the field of education, Dr. Schinnerer testified that in his opinion the mandatory maternity leave was a "good rule" because "it protects the continuity of the classroom program" (A. 189), as well as the teachers.

The continued administrative validity and necessity of the rule was underscored by Defendant Julius Tanczos, Jr., Supervisor of Organization for the Cleveland secondary schools. Mr. Tanczos had served the Cleveland schools as a teacher and administrator for 21 years, and was the key administrative official responsible for teacher staffing in Cleveland junior and senior high schools (A. 206).

Based on his experience as a teacher and an educational administrator, and based upon his day-to-day responsibility for administering a workable teaching program for Cleveland children, Mr. Tanczos stated that it was his opinion that not only was the rule a good rule, but that it was "necessary for the effective operation" of the school system (A. 216).

Mr. Tanczos testified as to the documented evidence of teacher assaults (A. 207) and teachers accidents (A. 210), the general duties of all school teachers, which include maintaining order in hallway, recreation and food areas (A. 211), being "on his or her feet for six periods of a school day" (A. 227), and the administrative problems "in the identification of a replacement for the teacher" absent adequate notice *and* a firm cut-off date (A. 213).

Respondents' evidence at trial did not dispute the testimony of exposure to physical trauma, duties of the teacher, or the administrative need for a uniform rule regarding teachers' termination of their duties for maternity reasons. Rather, the thrust of respondents' evidence was solely that the point during pregnancy at which each teacher relinquishes her teaching duties should be determined on an individual or case-by-case basis, and that this variable cut-off date for each of the hundreds of teachers pregnant at any one time in the Cleveland school system should be determined solely by her, and her private obstetrician, without reference to the well-being of the students or the duty of the school system to teach its pupils in the most effective manner.

SUMMARY OF ARGUMENT

On the undisputed evidence before this Court, the challenged maternity leave policy of the Cleveland Board of Education has not deprived plaintiffs of either a "fundamental" Constitutional right nor the Equal Protection of Laws under the Fourteenth Amendment.

That evidence establishes that after the fourth month of her pregnancy a pregnant school teacher is not as able-bodied in the classroom as she was before. She cannot perform the physical tasks which she is required to perform with the same degree of mobility and freedom from physical disability that she could before her pregnancy. She is overweight and physically unbalanced. She needs to urinate more frequently. She has an increased risk of serious physical disability. She is more susceptible to the assaults of children and the risk of falling. She has certain classic fears which are exacerbated by the environment in which she finds herself. Not only is she no longer physically as capable as she was, but the uncertainty of her status affects the administrative efficiency of the school's operation.

These facts are before this Court on this record. They involve neither speculation nor conjecture. The findings of the District Court have not been attacked as "clearly erroneous" under Rule 52 of the Rules of Civil Procedure and obviously could not be.

The challenged regulation is a legitimate effort to maintain able-bodied teachers in an environment where they are needed and the means chosen are consistent with Equal Protection.

The constitutional validity of the regulation should be judged by the traditional standard of judicial review most recently followed by this Court in *Rodriguez*, 93 S. Ct. 1273 (1973).

Local control of educational policy is a legitimate objective achieved by the challenged regulation.

It is the nature of the judicial process in our common law country to apply the law to the facts as the facts are presented to the Court. The facts in this case describe in substantially undisputed detail the environment of a great metropolitan school system wherein the felt need for able-bodied teachers has brought about the challenged regulation. The facts in this case are largely undisputed and were presented in open court and subjected to rigorous cross examination. The challenged maternity leave rule is desirable for the school system and fulfills a useful administrative requirement of continuity in the educational process. For a limited period of time, it deprives pregnant teachers of income, but only temporarily, and only as a result of a physical condition which they have voluntarily assumed. There is nothing invidious, there is nothing totally arbitrary about this case. There is nothing about the mandatory maternity leave regulation on this record which arbitrarily deprives a healthy, active, able-bodied teacher of a few months' salary.

The suspect classification adopted by four justices of this Court in *Frontiero,* 93 S. Ct. 1764 (1973), is, even if it were to be adopted as the majority view of this Court, inapplicable to the case at bar because *Frontiero* recognizes physical disability as a non-suspect classification.

Lastly, even if this case were to be judged by the strict judicial scrutiny applied by the four justices in *Frontiero,* the Board's regulations should be upheld.

The decision of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

ARGUMENT

I. THE MANDATORY LEAVE POLICY OF THE CLEVELAND BOARD DOES NOT INFRINGE ON ANY FUNDAMENTAL CONSTITUTIONAL RIGHT.

One of the requirements for the application of the "strict standard of judicial review" is whether the chal-

lenged state classification "impermissibly interferes with the exercise of a 'fundamental' right and that accordingly the prior decisions of this [Supreme] Court require the application of the strict standard of judicial review," *Rodriguez,* 93 S. Ct. at 1294. The requirement is also stated in the concurring opinion of Mr. Justice Stewart,

> "Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classification." 93 S. Ct. at 1311.

Nowhere in his opinion in *Frontiero* does Mr. Justice Brennan assert that a fundamental right of plaintiffs was violated by the sex discrimination which he found in the challenged statute in that case.

Rodriguez squarely holds that "education" is not a fundamental right in the sense that it is among the rights and liberties protected by the Constitution.

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicity so protected." 93 S. Ct. at 1297.

If a student in a public educational institution has no fundamental Constitutional right to an education, it follows, *a fortiori,* that the teacher teaching that student has no fundamental Constitutional right to teach, absent any claim, and there is none such here, of her being deprived of such First Amendment rights as freedom of speech as in *Pickering v. Board of Education,* 391 U.S. 563 (1968), or due process of law, as in *Board of Regents v. Roth,* 408 U.S. 564 (1972) and *Perry v. Sindermann,* 408 U.S. 593 (1972). Respondents argued in the court below, and may be expected to argue here, that the mandatory maternity leave policy deprives them of such fundamental rights as the right to work, the right to marry, and the

right to bear children. This is simply not so. The only teachers' "right" affected by the Cleveland maternity leave rule is an asserted "right" temporarily to be employed as a Cleveland school teacher while in an advanced stage of pregnancy.

There is no claim that plaintiffs were denied procedural due process nor that they were placed on mandatory maternity leave for political reasons. No abridgment of free speech is asserted. Plaintiffs have no property rights to continue teaching other than those granted to them by state law. That is to say, no constitutionally protected rights are here involved. As Mr. Chief Justice Berger said in his concurring opinion in *Perry v. Sindermann*, 402 U.S. 593 at 603:

> ". . . the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law."

And as Mr. Justice Stewart, speaking for the Court in *Board of Regents v. Roth*, the companion case to *Sindermann*, points out, "respondent's 'property' interest in employment . . . was created and defined by the terms of his appointment." 408 U.S. at 578.

The most recent opinion of a United States Court of Appeals construing Ohio law, subsequent to *Roth*, supports the view that in the absence of such first amendment claims as are not in issue here, an Ohio teacher has no Federal Constitutional rights arising above those of her contract and the laws of the State: *Patrone v. Howland Local Schools Board of Education*, 472 F. 2d 159 (6th Cir. 1972). To the same effect is *Orr v. Trinter*, 444 F. 2d 128, 133 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972), rehearing denied ..... U.S. ....., wherein the Sixth Circuit said there is "no constitutionally protected right to government employment" by an Ohio school teacher whose Constitutional rights were not violated by an unexplained refusal to renew his contract.

II. RESPONDENTS HAVE NOT BEEN DEPRIVED OF THE EQUAL PROTECTION OF LAWS

A. Rodriguez Supports the Traditional Standard of Review in Equal Protection Cases Involving Local Educational Policy.

The issue which this Court resolved in *Rodriguez* was whether the educational policy involved in that case, viz. the Texas method of raising funds for public school education by providing a certain amount from the state and leaving it up to each local school district to provide additional amounts, denied equal protection of law to children in certain poor districts. This Court held, as pointed out above, that no fundamental Constitutional right of the school was involved in the case.

In reaching this conclusion this Court first considered whether or not the challenged Texas educational policy created the kind of classification between students in poor and wealthy school districts which should be subjected to strict judicial scrutiny rather than analyzed under traditional standards of review. Plaintiffs had alleged, in *Rodriguez*, that the evidence established a definite class of poor children who were deprived of education by the classification and similarly alleged that a classification based on the wealth of each school district should be subjected to strict judicial scrutiny. This Court carefully and thoroughly reviewed the Texas system in the light of its dual purpose to extend and improve public education while maintaining local control. It concluded that:

> "[I]n substance, the thrust of the Texas system is affirmative and reformatory, and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to rights reserved to the States under the Constitution." 93 S.Ct. at 1300.

In rejecting strict scrutiny, which the Court describes as "its most exacting scrutiny", 93 S.Ct. at 1294, the Court held that the system of alleged discrimination and

the class it defined had none of the "traditional indicia of suspectness". These indicia were explained:

> "[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 93 S.Ct. at 1294.

Having determined that such traditional indicia were absent, the court in *Rodriguez* stated:

> "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state system be shown to bear some rational relationship to legitimate state purposes." 93 S.Ct. at 1300.

There followed in *Rodriguez* a careful review of the Texas system and a determination that it satisfied the two conflicting forces in public education, i.e., an educational opportunity for all children coexistent with the desire of each family to provide the best education it can afford for its own. 93 S.Ct. 1302-1305. This Court then concluded that not only was the action of the State of Texas in furtherance of a legitimate state purpose, but that the method chosen bore a rational relationship to that purpose.

The concurring opinion of Mr. Justice Stewart in *Rodriguez* is of substantial importance to the case at bar. Even though Mr. Justice Stewart stated that the challenged Texas State action created "a chaotic and unjust" system of public education in Texas, he said that it did not violate the Federal Constitution when tested by "principled adjudication under the Equal Protection Clause of the Fourteenth Amendment." 93 S.Ct. at 1310.

Mr. Justice Stewart made clear that the Equal Protection Clause "confers no substantive rights and creates no substantive liberties." Its function "is simply to mea-

sure the validity of *classifications* created by state laws" (emphasis in original). The Equal Protection Clause "is offended only by laws that are invidiously discriminatory —only by classifications that are wholly arbitrary or capricious." He said "the basic presumption of the constitutional validity of a duly enacted state or federal law" disappears only when a state had enacted legislation whose purpose or effect is to create classes based upon criteria that, in a Constitutional sense, are inherently "suspect", or, as has been pointed out above, that impinge upon a "substantive right or liberty created or conferred by the Constitution." 93 S.Ct. 1310, 1311.

Mr. Justice White dissented in *Rodriguez*, not because the state classification therein challenged did not further a legitimate state purpose. In fact, he believed that the Texas system "seeks to achieve the valid, rational purpose of maximizing local initiative." 93 S.Ct. at 1314. However, he felt that the means chosen by the State were not rationally related to the end sought to be achieved in that there was no adequate provision for poor school districts to augment their revenues. 93 S.Ct. 1311-1314.

B. The Local Educational Policy Promulgated by the School Board Regulation in the Case at Bar Fulfills a Legitimate State Objective in a Rational Way.

Tested by the standards of the majority in *Rodriguez*, as well as by the standards of Mr. Justice Stewart's concurrence and Mr. Justice White's dissent, the challenged school board regulation here meets the traditional test of Equal Protection. The evidence shows that the purpose of the regulation is to develop an orderly and efficient procedure to maintain an adequate continuity of able-bodied classroom teachers. The means chosen to effectuate that purpose is a fair one, even-handedly applied and supported by the best medical evidence that the Board could find.

Whether the mandatory maternity leave should begin at the beginning of the fifth or the sixth or the seventh month of pregnancy is medically debatable. The time chosen by the Board is close to that which doctors and lawyers themselves choose in determining whether a termination of pregnancy is abortion or a miscarriage. As Mr. Justice Blackmun stated for the Court in *Roe v. Wade*, 93 S. Ct. 705 (1973), the common law and Christian theology fixed the time at which a fetus becomes a "person" and infused with a soul at the "quickening", which is from the 16th to 18th week of pregnancy. The School Board here had to make a decision where to draw a line, and its decision to draw it where it did was neither arbitrary nor did it fail to achieve its purpose.

The difficulty of where a court or a state legislature or a school board should draw a line has been nowhere more clearly expressed than by Mr. Justice Holmes in his *Collected Legal Papers* (1921) where he says:

> "In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. It is evident in the beginning that there must be differences in the legal position of infants and adults. In the end we establish twenty-one as the dividing point. There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour after sunset and one hour before sunrise, ascertained according to mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either

lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations." p. 232.

See also Mr. Justice Holmes' dissent in *Schlesinger v. Wisconsin*, 270 U.S. 230 (1925),

". . . It seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate.

• • • • •

". . . and while I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree, you must realize that reasonable men may differ widely as to the place where the line should fall." 270 U.S. at 241-242.

C. The Opinion of Mr. Justice Brennan in Frontiero Does Not Apply in the Circumstances of This Case to Require an Uncritical and Unqualified Application of the Suspect Classification Criterion.

The opinion of Mr. Justice Brennan in *Frontiero* is based, it is respectfully submitted, upon an unwarranted extension of *Reed v. Reed*, 404 U.S. 71 (1971), and upon the adoption, without saying so, of the language of the California Supreme Court in a case which holds directly contrary to an earlier and heretofore unchallenged decision of this Court. It is further submitted that the very reasons given by Mr. Justice Brennan to apply the suspect classification to the facts in *Frontiero* support its non-applica-

tion in the case at bar. It is suggested that whatever "romantic paternalism" existed in the attitude of the law towards women in the past, is today of historic interest only. Finally it is asserted that the argument that because Congress, by legislation, and the Equal Employment Opportunity Commission, by regulation, have abolished sex discrimination therefore this Court should declare sex a suspect classification is not valid as to the facts of this case.

To say that *Reed v. Reed* gives "at least implicit support", *Frontiero*, 93 S. Ct. at 1768, for a determination that sex is an inherently suspect classification is to extend and modify the opinion of the unanimous court in *Reed*. Similarly, to describe the language of *Reed* as a "departure from 'traditional' rational basis analysis with respect to sex-based classifications," 93 S. Ct. 1769, is a *tour de force* through what Reed actually says. The ground for the decision in *Reed* is set forth clearly in the following language:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). *The question presented by this case*, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of Sections 15-312 and 15-314 [the challenged state statutes]." 404 U.S. at 76. (emphasis supplied).

Until Mr. Justice Brennan's opinion in *Frontiero* on May 14, 1973, this Court, including Mr. Justice Brennan, had asserted that that language quoted above constituted an adoption of the traditional standard. Mr. Justice Brennan so announced for this Court when he quoted *exactly this language* in *Eisenstadt v. Baird*, 405 U.S. 438, 446-447 (1972), prefacing the quote as follows:

> "The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As THE CHIEF JUSTICE only recently explained in *Reed v. Reed,* 404 U.S. 71, 75-76, 30 L.Ed.2d 225, 229, 92 S.Ct. 251, (1971):"

Eisenstadt was decided in March, 1972, and the "familiar" "basic principles" therein described left, until *Frontiero,* no room for doubt.

The thrust of Mr. Justice Brennan's opinion in *Frontiero* is that the imposition of special disabilities upon the members of a particular sex solely because of their sex is suspect. He says:

> "Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175, 92 S. Ct. 1400, 1407, 31 L. Ed.2d 768 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero,* 93 S. Ct. at 1770.

In the above quotation lies the basis for Judge Brennan's opinion that sex is a suspect classification, i.e., sex is suspect because "the sex characteristic" bears no relation to ability to perform.

In the case at bar, however, the record is clear that the sex characteristic has nothing whatsoever to do with the mandatory maternity leave rule. The mandatory maternity leave rule is a "nonsuspect statute" based upon

"physical disability." It has nothing to do with sex as such, but only when the condition of sex voluntarily creates another condition – pregnancy. Even then pregnancy is not the determining classification, but it is only when the time comes, on the basis of reasonable medical evidence and administrative necessity, that her pregnancy makes the school teacher physically disabled within the environment of the school classroom that the classification applies. Here is a case where ability to perform or contribute to society is hampered by the condition of pregnancy. Respondents would seek to hide their physical disability to perform in the classroom by attributing it solely to their sex.

It is of more than passing interest to note the origin of the language which Mr. Justice Brennan uses. It comes, almost word for word, from the opinion of the Supreme Court of California in the case of *Sail'er Inn, Inc. v. Kirby* 5 Cal. 3d. 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). There the Court says:

> "Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. (See Note: Developments in the Law – Equal Protection, *supra*, 82 Harv. L. Rev. 1065, 1173-1174.) The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members." 485 P.2d at 540.

Mr. Justice Brennan's opinion nowhere refers to *Sail'er Inn* and nowhere identifies the language of his opinion as coming from *Sail'er Inn*.

This is extraordinary because *Sail'er Inn* is squarely and directly in conflict with the decision of this Court in *Goesaert v. Cleary*, 335 U.S. 464 (1948). *Goesaert* is never mentioned in the opinion nor in any footnote in *Frontiero*.

The facts in *Goesaert* and the facts in *Sail'er Inn* could hardly be closer. *Goesaert* held constitutional, and not in violation of the Equal Protection Clause, a Michigan statute forbidding any female to act as a bartender unless she be "the wife or daughter of the male owner" of a licensed liquor establishment.

Sail'er Inn held unconstitutional, and in violation of the Equal Protection Clause, a California statute forbidding any female to act as a bartender unless she be the wife of the male owner or the sole shareholder (or with her husband) of a corporation holding the liquor license.

The Supreme Court of California, the same court whose opinion in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, (1971) was disapproved of and not followed by this Court in *Rodriguez* (see *Rodriguez* 93 S. Ct. at 1308), has now been followed, almost word for word, in an opinion concurred in by four judges in *Frontiero* without either an acknowledgment of its source nor a statement that the California decision is directly in conflict with a previous decision of this Court.

The *Harvard Law Review* citation which appears in both decisions contains the germ of some of the ideas expressed in the opinions but, except for a footnote at 1174, does not deal with sex as a suspect classification. Note, *Developments in the Law — Equal Protection*, 82 *Harv. L. Rev.* 1065, 1174 (1969). The footnote recognizes that sex is not a suspect classification "as long as experience teaches that the biological differences between the sexes are often related to performance," citing *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and acknowledges that as the truth of that proposition is drawn into question so also will the non-suspect nature of a sex classification.

From the foregoing, it is clear that whatever the source of Mr. Justice Brennan's opinion in *Frontiero*, it is distinguishable from the case at bar. Here, unlike *Frontiero*, the condition of pregnancy is directly related to ability to

perform or contribute to society in the classroom. Nowhere in the record is there any allegation that women, as women, whether pregnant or not, are discriminated against by the challenged regulation of the Cleveland School Board. The only allegation is that at a certain time women, who are under a certain condition, i.e., pregnancy, are treated in a different fashion than women and men who are not in that condition. The record is clear that the reason for that treatment has nothing to do with the fact that respondents are women but everything to do with the fact that they are in an advanced stage of pregnancy. The distinction between pregnant and non-pregnant teachers does not relegate the non-pregnant teachers, because of their sex, to any inferior legal status and only temporarily affects pregnant teachers.

No female today, teacher or not, is required to become pregnant. Laws forbidding the dissemination of information about contraceptives are unconstitutional, *Griswold v. Connecticut*, 381 U.S. 479 (1965), whether the recipient be married or not, *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Laws prohibiting abortion during the first trimester of pregnancy are likewise unconstitutional, *Roe v. Wade*, 93 S. Ct. 705 (1973).

Roe v. Wade is relevant to, although not dispositive of, another point. That case establishes that *after* the first trimester of pregnancy, the State "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 93 S. Ct. at 732. This Court has thus recognized that in the interest of a prospective mother's own maternal health, reasonable regulations dealing with her pregnant condition may be imposed by the State after the first three months of pregnancy. While petitioners do not contend that the health of the pregnant teacher, for her sake alone, is a justification for the regulation, it is relevant to state, as the opinion of Mr. Justice Blackmun does in *Roe v. Wade*,

that there comes a time when the State does have an interest in the physical condition of a pregnant woman.

While the four judge opinion in *Frontiero* quotes liberally from the brief of the American Civil Liberties Union, *amicus*, as to the disadvantaged state of women in society, it recognizes that these disadvantages are largely historical, and, at the present time, by reason of federal legislation, no longer, in law, exist. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-2 (a),(b),(c) (1970), the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970), and the proposed Equal Rights Amendment to the Constitution, March 22, 1972, H.J. Res. No. 208, 92d Cong., 2d Sess. (1972). In any event, as Mr. Justice Stewart stated in *Board of Regents v. Roth*, 408 U.S. 564, 579 (1972):

> "It is a written Constitution that we apply. Our rule is confined to interpretation of that Constitution."

It is also relevant to point out that the Equal Employment Opportunity Commission regulations, while entitled to "great deference", *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971), are not of controlling weight here. The EEOC has adopted a rule prohibiting mandatory leave disability rules as discriminatory on the ground of sex. *Employment Policies relating to Pregnancy and Childbirth*, 29 C.F.R. § 1604.10(b) (1972). These regulations were issued after the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(a), (b), and 2000e-1 (1972), was amended to apply to public school employment. *One week* after the passage of this 1972 Act, the Equal Employment Opportunity Commission issued new rules containing "guidelines" on mandatory maternity leaves. These guidelines made it a *prima facie* violation of Title VII for an employer to exclude employees "from employment . . . because of pregnancy." 29 C.F.R. § 1604.10(b) (1972).

The "guidelines" issued by the EEOC are to be distinguished from procedural "regulations" which are issued to carry out the provisions of Title VII. Any procedural

regulations issued by the EEOC require adherence to the Administrative Procedure Act, 42 U.S.C. § 2000e-12(a) (1964). The EEOC has issued procedural regulations which deal with such matters as the filing of charges and investigation of charges, pre-decision procedure, conciliation and settlement efforts and issuance of notices. 29 C.F.R. Part 1601 (1972).

The EEOC's *Guidelines on Discrimination Because of Sex* are in no sense procedural regulations but are based upon 42 U.S.C. § 2000e-12 (b) (1) (1964) which suggests that the Commission has authority to issue written interpretations and opinions.

The sex discrimination guideline quoted above was issued without adhering to the Administrative Procedure Act. Indeed, the sex discrimination guidelines adopted by the EEOC expressly so state:

> "Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable." 29 C.F.R. Part 1604 (1972).

This Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), not only stated that these guidelines were entitled to "great deference" but also that since the Act and its legislative history supported the Commission's construction in that case, it afforded good reason to treat the guidelines as expressing the will of Congress. 401 U.S. at 433-34.

Lower courts construing these guidelines have recognized that, while entitled to deference, they are "not a regulation having the force or effect of law." *American Newspaper Publishers Association v. Alexander*, 294 F. Supp. 1100, 1103 (D.D.C. 1968). In *Dobbins v. Local 212 International Bro. Elec. Workers*, 292 F.Supp. 413, 449 (S.D. Ohio 1968), it was expressly held that the EEOC can issue "suitable procedural regulations" but cannot issue substantive regulations with the force of law.

Since *Griggs v. Duke Power Co.*, the Sixth Circuit, in 1972, issued an important decision in *Espinoza v. Farah Mfg. Co.*, 462 F.2d 1331 (6th Cir. 1972). That case involved an EEOC guideline which sought to equate discrimination on the basis of citizenship with discrimination on the basis of national origin and went on to say that a lawfully immigrated alien cannot be discriminated against because of his foreign citizenship. The court refused to follow the EEOC guideline and stated:

> "Thus, to the extent such discrimination has been declared by the EEOC to be *per se* illegal, we refuse to follow its regulation . . . while *acknowledging deference is due, blind adherence is not.*" (emphasis supplied). 462 F.2d at 1335.

It is thus submitted that where, as here, the challenged classification is based on disability and not sex, the four judge opinion in *Frontiero* supports petitioners position. It is clear from the concurring opinions of Mr. Justice Powell and Mr. Justice Stewart in *Frontiero* that the Air Force regulation challenged there worked an invidious discrimination against women within the traditional criterion of *Reed*, and that *Frontiero*, in their opinion, is simply a clear-cut application of *Reed*.

D. The Challenged Maternity Rule Is An Example of Local Initiative and Local Control Over Educational Policies.

The concern of the majority in *Rodriguez* for the principle of local control over public school systems is not a new departure for this Court. In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), it is said:

> "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Consistent with this is the statement in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) that "education is perhaps the most important function of state and local government."

In *Rodriguez*, this Court said:

> "... This case also involves the most persistent and difficult question of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." 93 S.Ct. at 1301.

Similarly, at 1305, the majority quotes the opinion of Mr. Justice Stewart in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972),

> "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society."

The concept of local control is deeply rooted in the Constitution and statutes of Ohio.

The Constitution of Ohio vests in the Ohio General Assembly the power to provide by law for "the organization, administration and control of the public school system." OHIO CONST. art. VI, § 3; art. I, § 7. The General Assembly has conferred upon each Board of Education "the management and control of all of the public schools of whatever name or character in its respective district." OHIO REV. CODE § 3313.47. A Board of Education is, in addition, expressly empowered to:

> "make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises." OHIO REV. CODE § 3313.20.

Section 3319.13 of the OHIO REV. CODE provides that a Board of Education may grant *involuntary* leaves of absence to any teacher "because of physical or mental disa-

bility." In such case, the teacher has the right to request a hearing in accordance with § 3319.16 of the OHIO REV. CODE, which right is waived unless the teacher "demands in writing an opportunity to appear before the board" within ten days of notice of leave.

The record in the case at bar raises no question of failure on the part of the Cleveland school system to accord plaintiffs the full procedural due process required by the Ohio or Federal Constitutions.

The Ohio courts have recognized the importance of local control by Boards of Education and school administrators in Ohio:

> "... [T]he rule-making power of such boards for the proper conduct, control, regulation and supervision of its employees, pupils and the entire school system is unlimited except to the extent that it is curtailed by express law, and ... in the absence of fraud, abuse of discretion or arbitrariness or unreasonableness a court will not interfere with the authority of a board of education to make rules and regulations, nor substitute its judgment for that of the board in the conduct of the affairs of the school." *Holroyd v. Eibling*, 116 Ohio App. 440, 445-46 (Franklin County Ct. App.), *appeal dismissed*, 174 Ohio St. 27 (1962).

E. Precedent Unqualifiedly Supports the Position that A Classification Based on Sex Should be Tested By the Traditional Standard of Review.

Prior to *Reed* and *Frontiero* there were at least five United States Supreme Court cases which expressly or impliedly required the application of the traditional standard in alleged instances of sex discrimination and violation of the Equal Protection of Law Clause.

In *Goesaert v. Cleary*, 335 U.S. 464 (1948), a Michigan statute forbidding any female to be a bartender, except the wife or daughter of a male bar owner, was held not to be a violation of equal protection of the laws. Mr. Justice Frankfurter, writing for the majority, stated:

> "While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.' *Tigner v. Texas*, 310 U.S. 141, 147 . . . We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.
>
> "It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of the equal protection of the laws has been applied. The generalities on this subject are not in dispute; their application turns peculiarly on the particular circumstances of the case." 335 U.S. at 466-67.

Again, in *Hoyt v. Florida*, 368 U.S. 57 (1961), this Court upheld, as consistent with the equal protection clause, a Florida statute exempting women from jury service absent their volunteering. In doing so this Court employed the reasonableness test:

> "[W]e cannot regard it as irrational for a state legislature to consider preferable a broad exemption, whether born of the State's historic public policy or of a determination that it would not be administratively feasible to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption." 368 U.S. at 63.

To the same effect are the earlier cases of *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon statute limiting hours of work for women); *Breedlove v. Suttles*,

302 U.S. 277 (1937) (Georgia statute exempting non-voting females, and others, from payment of poll tax held not to deny equal protection of the laws to males); *Radice v. New York*, 264 U.S. 292 (1924) (holding not a violation of equal protection a New York statute prohibiting the employment of women at night in restaurants in large cities).

More recently, this Court affirmed the holding of a three-judge court that equal protection is not violated by an obviously sex-based South Carolina statute limiting enrollment at Winthrop College exclusively to "girls." *Williams v. McNair*, 316 F. Supp. 134 (D. S.Car. 1970), *aff'd on appeal*, 401 U.S. 951 (1971). The unanimous opinion of the three-judge court is unqualified:

> "The Equal Protection Clause of the Fourteenth Amendment does not require 'identity of treatment' for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause. Specifically, a legislative classification based on sex, has often been held to be constitutionally permissible. [Citing numerous cases.] Thus, the issue in this case is whether the discrimination . . . based on sex, is without rational justification.
>
> * * *
>
> ". . . While history and tradition alone may not support a discrimination, the Constitution does not require that a classification 'keep abreast of the latest' in educational opinion, especially when there remains a respectable opinion to the contrary; it only demands that the discrimination not be wholly wanting in reason. Any other rule would mean that courts and not legislatures would determine all matters of public policy." 316 F. Supp. at 136-137. (footnotes omitted).

It is of interest to note that this Court's "summary disposition of the case . . ." has been said to "suggest the

Court is not about to impose strict standards of review in sex classification cases." Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 881 (1971).

Indeed, of the cases in the various Circuits of the Court of Appeals and in the Supreme Court of Pennsylvania, which have reviewed the constitutionality of mandatory maternity leaves, only two have applied the strict standard. One is the Sixth Circuit in the case at bar. Even then, an attempt was made to pay lip service to *Reed*. 465 F.2d at 1188. The other is *Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973). *Buckley* simply reversed a summary judgment for the Board of Education, held that evidence was required and adopted the strict standard because of allegations of racial discrimination and First Amendment denials.

Of course, the case being argued in tandem with this case, *Cohen v. Chesterfield County School Board*, No. 72-1129, adopts the traditional rule, both in the opinion in the Court of Appeals, 474 F.2d 395 (4th Cir. 1973), and in the District Court, 326 F. Supp. 1159 (1971). In *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), the Ninth Circuit upheld an Air Force regulation providing for discharge of pregnant women officers on the traditional equal protection standard. The same result was reached by the Fifth Circuit in *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 901 (1973). In *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir. 1973), the United States Court of Appeals for the Second Circuit on January 29, 1973, adopted what it called the "rational basis scrutiny" as the appropriate standard of review. 473 F.2d at 632, 633. In that case summary judgment had been granted to a Board of Education by the District Court. 349 F. Supp. 687 (D. Conn. 1972).

The Second Circuit reversed. It took the position that this Supreme Court,

> ". . . has apparently narrowed the linguistic gap between the two standards; it has avoided the terminology of two-tiered review in some cases, by posing instead certain fundamental inquiries applicable to 'all' equal protection claims." 473 F.2d at 633.

The Court then quotes from *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 173 (1972) that "the essential inquiry" in all equal protection cases is a dual one, i.e.,

> "What legitimate state interests does the classification promote? What fundamental personal rights might the classification endanger?" 473 F.2d at 633.

It also quotes from *Police Department v. Mosley*, 408 U.S. 92, 95 (1972), as to the rule that in all equal protection cases the crucial question "is whether there is an appropriate governmental interest suitably furthered by the differential treatment." 473 F.2d 633.

The Second Circuit, in *Waterford*, describes the "heart of plaintiff's case" as follows:

> "The heart of plaintiff's case is that disqualifying a physically capable women from working because of a condition related solely to her sex is unconstitutionally discriminatory . . . Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling." 473 F.2d at 634.

The weakness of the *Waterford* argument is recognized in the next paragraph of the opinion where the Second Circuit says,

> ". . . Indeed, we note that a principal problem on this appeal is an altogether abbreviated record, consisting of little more than plaintiff's verified complaint,

> defendant's answer, a few short interrogatories, the argument on the motion for a preliminary injunction, and the district judge's opinion. We thus have no assurance that any legitimate interest arguably promoted by the rule has been identified or articulated by the Board." 473 F.2d at 634.

In the next paragraph it is pointed out that defendant Board had not offered any evidence as to the competency of a pregnant woman. Later in the opinion the Second Circuit says:

> "When the comparison is with other female teachers, any justification for focusing solely on those who are pregnant is still more dubious in the abstract and wholly so on this record." 473 F.2d at 635.

The court concluded with these words:

> "From the foregoing analysis, we conclude that the Board's maternity leave rule, which arbitrarily forces *a physically capable woman like plaintiff* to leave her job before required to do so for medical reasons, is discriminatory and that there are no 'legitimate state interests' which the rule's rigid classification sufficiently promotes to justify such discriminatory treatment." (emphasis supplied) 473 F.2d at 636.

Waterford is, actually, the strongest authority in support of petitioners' case. It is apparent from *Waterford* that had evidence been before that Court as to the physical disqualification of the pregnant teacher, the result would have been in favor of the Board of Education. Unfortunately, the case was decided on a poor record. The "heart of plaintiff's case" is "disqualifying a physically capable woman." The record in the case at bar, unlike the record in *Waterford,* is full of sound and undisputed medical evidence that a pregnant school teacher is not a physically capable women in the classroom.

The analogy in *Waterford* to a male teacher's operation falls on its face. It is not the planned operation months ahead that disqualifies the male teacher, it is whether or

not the male teacher is presently unable to teach. If a cataract operation, for example, were necessary because the male teacher had become physically so impaired in his vision that he could not teach, then he should be placed on leave of absence. Ohio statutes so provide. OHIO REV. CODE § 3319.13. Here however, it is a disability caused by pregnancy and not a disability to be caused at some future time by some future operation which disqualifies the teacher. On the record before it, *Waterford* is correct. On the record before this Court in this case, *Waterford* is good authority for petitioners.

In addition to the case at bar from the Sixth Circuit, the case in tandem with it, *Cohen v. Chesterfield County School District*, 474 F.2d 395 (4th Cir. 1973), *Waterford* and *Buckley*, two other Circuits of the Court of Appeals have considered the constitutionality of mandatory maternity leaves. In both of them, the regulations were upheld.

The Fifth Circuit, in *Schattman v. Texas Employment Commission*, 459 F.2d 32, *cert. denied*, 93 S. Ct. 901 (1973), considered a somewhat stricter rule than the rule in the case at bar because not only were pregnant employees there required to take a leave no later than two months before the expected delivery date but they had no assurance of reinstatement. The Court below in the case at bar attempted to distinguish *Schattman* on the ground it was not as stringent a rule as that in the case here. However, *Schattman* stated that the rule there applied not only to leaves beginning at the end of seven months of pregnancy but at earlier periods as well. The court said:

> "The record further shows that one Texas agency terminates its women employees at the end of the fifth month of pregnancy and others at the end of six months. Still others terminate at the end of the seventh month." 495 F.2d at 40.

The Ninth Circuit, in *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), upheld against an Equal

Protection claim a regulation of the Air Force which provided for the discharge of pregnant women officers.

Both *Struck* and *Schattman* adopt the traditional rational basis test. *Schattman* specifically relies upon *Reed*.

As to *Cohen*, which is presently before this Court, the Fourth Circuit majority therein held that the mandatory maternity leave rule did not create an invidious discrimination based upon sex. That Court also held that the rule had a rational basis in the administrative necessity of continuity of classroom instruction. 474 F.2d at 399.

Little need be said of the case of *Cerra v. East Stroudsburg Area School District*, ... Pa....., 299 A. 2d 277 (1973). That case involved a mandatory maternity leave but the Court's decision turned on a violation of the Pennsylvania Human Relations Act, 43 P.S. § 955(a) (1955). The Court specifically said:

> "... it is unnecessary to determine if Mrs. Cerra's rights to Equal Protection and Due Process under the Fourteenth Amendment to the United States Constitution were also violated." 299 A.2d at 279.

Instead the case was decided on a record that failed to show that the teacher was "incompetent" within the meaning of a Pennsylvania statute. The Court concluded:

> "There was no evidence that the quality of her services as a teacher was or would be affected as a result of the pregnancy." 299 A.2d at 280.

Thus, in the absence of evidence that, while teaching, pregnancy prevented the teacher from doing her job as an able-bodied person, the Court could only reach the result that it did.

F. Even Tested By The Suspect Classification Standard, the Challenged Regulation in the Case at Bar Does Not Violate the Equal Protection Clause.

If this Court were to adopt as its majority view the rule that the school board regulation here challenged is

to be treated as inherently suspect and subjected to the strict standard of judicial review heretofore reserved for cases such as race, alienage, indigency and national origin, it is submitted that the regulation should still be upheld.

The undisputed evidence before this Court established that a pregnant school teacher after the fourth month of pregnancy is not as able-bodied in the classroom as she was before pregnancy. She cannot perform the physical tasks which she is required to perform with the same degree of mobility and ease that she could when not pregnant. The uncertainty of the time when she will leave the school affects the administrative operation of the school and makes it difficult to maintain the continuity of the educational process.

On these facts, even if this Court were to apply strict judicial scrutiny, the regulation should be upheld.

That is to say, if this Court should determine that the burden of proof of the reasonableness of the regulation lies upon the school board, that burden has been met by the evidence before this Court. The regulation is not arbitrary nor does it affect the female teacher unless she is over four months pregnant. Healthy, active, able-bodied female teachers are not affected and the only effect it has on pregnant school teachers is to deprive them of a few months salary during a period of time when they are demonstrably not as able-bodied as they were before.

Having in mind the importance of local control over educational policy within the school district as emphasized by *Rodriguez*, as well as the non-existent property interests of the plaintiffs, in a Constitutional sense, to continue teaching, as delineated in *Roth*, and *Sindermann*, even under the strict scrutiny test the regulation should be upheld.

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the judgment of the United States District Court for the Northern District of Ohio, Connell, J., should be reinstated.

Respectfully submitted,

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EXHIBIT A

CATALOGUE AND BIBLIOGRAPHY OF DISORDERS, DISCOMFORTS AND COMPLICATIONS OF PREGNANCY

I. IN GENERAL

The purpose of this Appendix is to present a bibliographic catalogue of the medical problems associated with pregnancy. The catalogue was derived from a review of medical journals, monographs, textbooks and other key references in the area of obstetrics and represents only the most current and widely-held medical opinion. No information that is subject to scientific substantiation or that is generally controversial is included unless it is so qualified.

For ease of presentation, the medical problems generated by pregnancy have been divided into three categories. Included in the first category are those disorders due to pregnancy that are generally considered serious and that require close medical supervision and care. Included in the second category are afflictions that cause discomfort to the pregnant woman but do not present a danger to the mother or fetus except in rare circumstances. The third category contains those diseases and disorders that are not caused directly by pregnancy but that may either interfere with or be complicated by pregnancy.

II. DISORDERS DUE TO PREGNANCY

A. **Toxemia.** Toxemia of pregnancy occurs in 6 to 7 percent of all pregnant woman and accounts for about one-third of the maternal deaths and at least 30,000 stillbirths per year in the United States. From 90 to 95 percent of the cases occur after the 30th week of pregnancy. A number of isolable factors have been thought to exercise some influence on the incidence of toxemia of pregnancy. One such factor is race, toxemia having been seen more often in non-white than in white women. The socio-economic

status of the mother is also cited as an influence. Indigent patients with poor diets and a haphazard exposure to prenatal care regularly exhibit a higher incidence of toxemia than private patients with good overall nutritional status who seek medical supervision early in pregnancy. Toxemia also occurs more frequently in multiple (i.e. twins) than in single pregnancies. Other specific predisposing factors include hydatidiform mole—the replacement of normal placental architecture by grape-like blisters—which may be responsible for those rare cases of toxemia seen prior to the 24th week; obesity, which predisposes to both hypertensive disease and pure toxemia; and diabetes, of which toxemia is a feared and frequent complication.

Psychologic considerations. Salerno, struck by the high incidence of toxemia in first pregnancies, questioned why that incidence should be higher in a group of younger women than in older women whose environmental conditions were approximately the same. He surveyed 1,176 consecutive deliveries in an urban hospital composed mainly of Puerto Rican women of poor socio-economic status and encountered 51 instances of toxemia. The basic pattern of these women was one of youth, first pregnancy, and unwed status. This combination of stressful circumstances, he believed, may lead to a body reaction allied to the general adaptation or stress syndrome which could produce a disturbance of the hypothalamic-pituitary-adrenal axis, which, in turn, could cause toxemia.

Bell and Wills made a study of racial differences in the incidence of toxemia on Fiji which also serves as an illustration of the psychologic factors in toxemia. Fijian natives who live a happy communal life without overt tensions have a low incidence of toxemia. An expatriate group of Indians, living under extreme psychologic stress on the same island, have a much higher incidence of toxemia despite a far superior diet. There is also some evidence that toxemia is more frequently encountered in

schizophrenic mothers than in otherwise similar non-schizophrenics but the data are fragmentary and inconclusive.

Definition. The term "toxemia" as it is used today has departed far from the original connotation of a "toxin" circulating in the blood. It is now a general term that describes a complex disorder of pregnancy, the most distinctive characteristic of which is hypertension. A great many of the women with toxemia all show albuminuria—protein in the urine. Toxemia is composed almost completely of two syndromes which have many similarities: (1) the acute form (preeclampsia-eclampsia) and (2) the chronic form (chronic vascular hypertension); some women can have both in the same pregnancy.

Preeclampsia and Eclampsia. Preeclampsia and eclampsia are the same disease complex, eclampsia being the worse manifestation. Less than one percent of the cases of preeclampsia deteriorate into eclampsia. Eclampsia is established by the appearance of convulsions.

Symptoms are usually completely lacking in the early stages of preeclampsia. Occasionally, however, complaints may include vague malaise, loss of appetite, headache or weakness. Definite signs are increased blood pressure, excessive weight gain, edema—the presence of abnormally large amounts of fluids in the tissue spaces of the body—greater than the usual slight swelling of the feet, and albuminuria. Dangerous symptoms are severe persistent headache, drowsiness, amnesia, vertigo, and visual disturbances (spots or flashes, blurred or double vision, blindness). Signs of severe or increasing involvement are nausea and vomiting, edema of the optic discs, vomiting of blood, jaundice, steadily increasing blood pressure, high pulse rate, respiratory changes, increasing widespread edema, lessened urinary output and severe albuminuria. Twitching of the extremeties is ominous and may herald the onset of

convulsions. Eclampsia may appear suddenly, a convulsion being the first manifestation.

The convulsions of eclampsia are dramatic. Labor is often brought on by eclamptic convulsions, and occasionally delivery is precipitated by the strain. Even with the best treatment, some 5 percent of eclamptic mothers still die. The most common cause of fetal death in toxemia is premature delivery and its associated complications.

Chronic Vascular Hypertension. Chronic vascular hypertension is included as a toxemia of pregnancy because of its resemblance to the acute form (preeclampsia-eclampsia) in diagnosis, treatment, prognosis for the mother and fetus, and because of the susceptibility of women with the chronic form to acquire the acute form. The disease is generally diagnosed when the blood pressure stands at 140/90 or above prior to the 24th week of pregnancy and there is subsequent evidence that the hypertension persists indefinitely after delivery.

B. **Hemorrhages.** The disorders of late pregnancy associated with hemorrhage are major factors in maternal mortality and contribute appreciably to the loss of fetal lives. Vaginal bleeding in the latter half of pregnancy occurs in about 5 percent of pregnant women. Significant blood loss is usually indicative of placental separation associated with placenta previa or abruptio placentae.

Placenta Previa. Palcenta previa is a condition in which the placenta is located over the cervical canal instead of in its normal position higher in the uterus. A placenta in this aberrant position may cover the cervical canal entirely (total placenta previa) or cover only a portion of the cervical canal (partial placenta previa).

Abruptio Placentae. The premature separation of the normally implanted placenta prior to the birth of the baby is designated as "abruptio placentae". Normal separation

of the placenta from its attachment inside the uterus takes place as the uterus contracts within a few minutes after the delivery of the baby. Although abruption occurs most often after the 28th week of gestation, it may develop earlier in pregnancy. Premature placental separation prior to the 20th week is part of the abortion process.

In rare cases, trauma has produced abruption. On occasion, the mother, previously well, has developed the signs and symptoms of abruption promptly after a serious accident. This, when combined with a lack of systemic signs often associated with abruption and a lack of pathologic change in the placenta has supported the possibility that trauma has caused the abruption.

There are a number of other conditions which may predispose to the occurrence of abruptio placentae.

Abruptio placentae has been reported to occur as often as once in 85 to 200 deliveries. Its incidence varies considerably in different institutions, depending on the hospital population and the diligence of the staff in establishing the diagnosis. Undoubtedly, many mild and localized separations escape notice because of the rapidity of delivery and the absence of serious complications. The patient who, in the latter part of pregnancy, develops uterine hemorrhage associated with pain usually has abruptio placentae.

In the patient with moderately severe abruptio placentae, abdominal pain is the rule and uterine tenderness is apparent.

The maternal mortality rate in abruptio placentae is probably between 1 and 2 percent. In severe abruptio placentae the fetus usually succumbs before definitive treatment can be instituted.

C. Genital Complications.

Rupture of the Pregnant Uterus. Rupture of the pregnant uterus is confined almost exclusively to the last tri-

mester of pregnancy. The rupture occurs most frequently at the site of an old incision in the uterus that has been previously subjected to cesarean section. The incidence of rupture of the uterus is somewhere between 1 in 1,000 to 2,000 deliveries. It may occur during pregnancy or labor; it may be spontaneous or traumatic in origin. A sharp blow to the abdominal wall can rupture the uterus when the latter is large enough to be in an exposed position.

Hemorrhage and pain are the most common aspects of a ruptured uterus although these symptoms are not always present and the degree of intensity varies.

Prompt surgical intervention and blood replacement as practiced in modern hospitals have changed the maternal prognosis from extremely serious to one in which death should be rare. The loss of the mother's uterus and further reproduction is the gravest aspect in the prognosis.

Extrauterine Gestation. Practically all extrauterine pregnancies occur in the fallopian tubes. Abdominal pain and a disturbance of the menstrual cycle are the leading clinical features of tubal pregnancies.

D. **Premature Labor.** Premature labor is arbitrarily defined as labor resulting in a live infant weighing not more than 2,500 grams (5½ pounds) at birth. Infants with a birth weight of less than 1,000 grams, because of their extremely poor chances for survival are often characterized as "immature". Prematurity ranks first among the causes of death of the newborn, accounting for the loss of more than 60,000 infants annually in the United States, or nearly ⅔ of all deaths during the neonatal period. The mortality among premature infants as a group averages 20 to 25 times that among infants of term weight, the risk of death being related directly to the degree of prematurity, i.e., inversely to the birth weight. Year in and year out, between 7 and 8 percent of all live births in the United States are premature.

Premature labor may be initiated by a variety of factors: maternal, fetal, and placental. No all-encompassing cause of prematurity has been recognized but there are clearly a number of predisposing conditions. Prominent among these stands multiple pregnancy (i.e. twins), doubtless because of the excessive distention of the uterus it produces. Toxemia of pregnancy is frequently associated with prematurity, but in the majority of cases only because it necessitates artificial termination of pregnancy by therapeutic induction of labor or cesarean section. The convulsions of eclampsia nearly always prematurely activate the labor mechanism. Chronic hypertensive vascular disease produces a doubling of the frequency of spontaneous premature labor.

A British numerical study (Stewart) concluded that women gainfully employed during the latter part of pregnancy experienced premature births approximately forty-four per cent more frequently than those not so employed. In addition, the study found the prenatal death rate and the incidence of toxemia also were higher among women gainfully employed. Another British study (Douglas) found that "women who have been gainfully employed during the last five months of pregnancy more often have premature babies than those who have left work at an earlier date." (Douglas, p. 165) While both studies cautioned that other factors interplayed with the factor of employment, the Douglas study attempted to create carefully matched "samples" and on the basis thereof concluded "that paid work [as carefully distinguished from household work] during the last months of pregnancy is associated with an increased risk of premature delivery." (Douglas, p. 166)

Other common medical conditions that predispose to premature labor include acute systemic infections, diabetes, hyperthyroidism, cardiac decompensation and chronic debilitating disease. Cigarette smoking has been also suggested as a likely cause of premature labor.

Accidents of placental implantation, such as placenta previa, and placental abruption, in addition to necessitating early delivery, cause a fivefold increase in the frequency of spontaneous premature labor; nearly half of all pregnant women with these complications fall into labor prematurely.

Trauma, such as accidental falls or blows to the maternal abdomen, may initiate premature labor by causing either rupture of the membranes or partial separation of the placenta. Surgical operations may likewise trigger labor prematurely after a latent period of approximately 48 hours; however, their mode of action is not so apparent.

E. Trauma.

Susceptibility to Trauma. As noted above, the increasing weight of the uterine mass, the protuberance of the abdomen, the change in the center of gravity of the mother and the frequent cramping and loss of sensation in the lower extremities make the pregnant women more prone to accidents and injuries than the non-pregnant woman. The mother's susceptibility to psychological trauma is generated by maternal instinct and the strong desire to protect the baby at all costs.

Trauma and Pregnancy Preceding Labor — Premature Rupture of Membranes. The fetal membrances in the ordinary course of events line the uterine cavity and completely surround the fetus. The principle functions of the membranes appear to be to retain and to assist in forming the amniotic fluid. Since the specific gravity of the infant is, for practical purposes, the same as the specific gravity of the amniotic fluid, the growth and development of the fetus occurs in a stable, mechanically buffered environment and in a state of relative weightlessness. Provision is thereby made for the unimpeded growth and development of the extremities and for muscular activity.

One of the hazards in all pregnancies is the premature rupture of the fetal membranes following the completion of the 6th month of gestation. Once the fetal membranes have broken and enough amniotic fluid escapes, premature delivery will usually follow. One of the possible reasons for membranes rupturing is the increase in intra-amniotic pressure. Theoretically, an accidental or intentional blow to the abdomen could build up enough intra-amniotic tension to produce a membrane rupture. However, the relationship between physical trauma and the rupture of the membranes has not been unequivocally established.

Trauma and the Rupture of the Uterus. The most frequent factor in uterine rupture is scarring of the uterus by previous surgery and the most common scar is the result of a previous cesarean section. A sharp blow on the abdominal wall when an old incision is present can rupture the uterus. With prompt recognition, the availability of a blood bank and with good surgical technique the maternal mortality rate following a rupture may be kept to a minimum; however, the fetal mortality in uterine rupture is approximately 30 percent.

Trauma and Hemorrhage. Placenta previa is not caused by trauma, but hemorrhage from it may be precipitated by external trauma, for example, intercourse. However, physical trauma has on occasion been the cause of the abruption of the placenta.

III. DISCOMFORTS DUE TO PREGNANCY

A. **Weight Gain and Awkwardness.** During the first months of pregnancy, the mother ordinarily loses a few pounds of weight, possibly as a result of nausea, but, during the entire pregnancy, the average weight gain is approximately 20 pounds. Most of this gain occurs during the last two trimesters. Often during pregnancy the mother has a greatly increased desire for food, partly as a result

of fetal removal of food from the mother's blood and partly because of hormonal factors. Some mothers, lacking discipline, eat tremendous quantities of food, and the weight gain, instead of averaging 20 pounds, may be as great as 75 pounds or more.

This increase in weight results in a marked lordosis—a backward arching of the lower part of the vertebral column—which changes the center of gravity of the pregnant woman, and results in an awkwardness of gait. Awkwardness is enhanced by the fact that the circulation to the lower extremities is compromised by the oxygen needs of the placenta and a certain amount of the oxygen meant to be utilized by the muscles of the lower extremities is stolen, in a sense, as the blood circulates toward the extremities from the heart. Deprived of good oxygenation, the muscles of the lower extremities are frequently known to go into spasm or to develop areas of loss of sensation, all of which may interfere to some extent with the gait of the pregnant woman. Because of these factors a pregnant woman has an increased propensity to accidents and injuries. Often pregnant women fall flat on their seats sustaining injury to the coccyx—the small bone which forms the extreme tip of the lower end of the spinal column lying just above the anus. Fractures of the forearm and of the leg or ankle bones are not uncommon in an obstetrical practice.

B. **Nausea and Vomiting.** During pregnancy, approximately 50 percent of the mothers develop hyperemesis gravidarum, a condition characterized by nausea and vomiting and commonly known as "morning sickness". Nausea and vomiting when experienced appear in about the 5th or 6th week of pregnancy and last for an indefinite period. Symptoms vary in severity from simple "morning sickness" to pernicious vomiting. Morning sickness begins with a feeling of nausea on arising; the mother is unable to retain her breakfast, but by noon the symptoms have

disappeared. The mother feels well until the following morning, unless symptoms are restimulated by some idiosyncrasy of taste or smell.

C. **Urinary Discomforts.** Pressure of the fetus against the bladder may produce a variety of urinary symptoms, including frequency, urgency, and the involuntary discharge of urine, often to a troublesome extent.

D. **Backache and Pelvic Pain.** The weight of the pregnant uterus can cause discomfort or pain in the pelvis, especially on the right side. Pain in the low back is also a troublesome complaint during pregnancy. It results from poor posture, fatigue, and lack of abdominal support. Aches and pains ordinarily can be relieved effectively by an abdominal or sacroiliac support, by increasing the daily rest period, or by changing the shoe style.

E. **Cramps.** The majority of pregnant woman experience cramps in the calves of the legs. These cramps are not caused by trauma or, indeed, by any recognized mechanism. A sudden cramp—a convulsive contraction of the muscle—suddenly appears in the calf and disappears rapidly with massage or active motion. It is generally not serious and carries no ill consequence.

F. **Varicose Veins.** Unnaturally swollen veins are ever prevalent in pregnancy. Varicose veins of clinically significant size first appear during the second or third month of gestation. The varicosities usually are located in the lower extremities either singly or in a wide distribution over thighs and legs. It has been variously estimated that from 20 to 50 percent of pregnant women exhibit some degree of varicosity of the leg and thigh veins, but only some 10 percent of these patients complain of disabling symptoms. More than half of all symptomatic cases will have developed by the end of the first trimester of pregnancy. Even when varicose veins are asymptomatic they can be prominent and unsightly.

A frequent initial complaint is an itching or burning of the skin overlying the engorged veins, often accompanied by a vague but uncomfortable sensation of heaviness in the affected parts. Sometimes the mother complains of an unsightly bluish discoloration of the skin over the varicosities. In addition, varicose veins can cause cramping, fatigue and slight to moderate pain in the muscles of the thighs and legs. All of these symptoms tend to increase as term is approached when the affected veins enlarge to their greatest extent. For treatment, periodic elevation of the legs is often recommended, a suitable routine being 3 times daily for periods of 10 minutes each. A maternity girdle and the avoidance of encircling garters and elastic stockings usually afford partial relief of the discomfort.

Varicose veins are not caused by trauma, but they have a susceptibility to injury that normal veins do not possess. Further, severe varicose veins carry a predisposition for thrombosis and there is a potential danger from hemorrhage should the veins become lacerated or severed.

G. **Excessive Salivation.** Excessive salivation, also known as ptyalism, occasionally occurs in pregnancy. The repeated filling of the stomach with saliva in large amounts contributes to the urge to retch. The mother and the fetus can be adversely affected only if the ptyalism merges with a serious manifestation of hyperemesis gravidarum (discussed above).

H. **Heartburn.** Heartburn (pyrosis) describes a burning sensation around the esophagus and is a common complaint in pregnancy, often causing considerable distress. To some extent, heartburn can be treated with a variety of substances that neutralize gastric hydrochloric acid.

I. **Constipation.** Constipation is an exceedingly common complaint of pregnancy. The exact cause of the decreased ability to evacuate the bowel during pregnancy

has not been determined. In the later weeks of pregnancy, the weight of the fetus on the lowest part of the large bowel tends to aggravate the condition. Hemorrhoids and other anal lesions are the only serious consequences of constipation.

J. **Hemorrhoids.** Hemorrhoids are dilated veins about the anus and are a frequent plague of pregnant women. Hemorrhoids may appear for the first time during pregnancy, or the condition may antedate pregnancy but become prominent only during the gestation period. External hemorrhoids are not troublesome unless there are complications. If they become infected, pain and itching may develop. At times, external hemorrhoids rupture and cause great pain. Internal hemorrhoids are more likely to become symptomatic, the most common symptom being bleeding. The amount of blood lost varies; usually, there is only spotting, but at times, a very painful thrombosis may result.

K. **Anxiety.** In most women the maternal instinct is so profound that any experience, however slight, which is believed to interfere with the health and welfare of the baby, may produce anxiety and concern. A reduced span of concentration is common to most pregnant women. Except for the psychotic patient who is out of touch with reality, pregnancy generally constitutes a crisis in the life of the average woman. Anxiety is present most frequently in a woman pregnant for the first time and is caused by her awareness that pregnancy means irreversible anatomic changes, an entirely new set of psychological relations with her husband and child and the termination of childhood.

IV. COINCIDENTAL MEDICAL DISORDERS COMPLICATING PREGNANCY

A. Disorders of the Cardiovascular System.

Heart Disease. If it is of sufficient magnitude, heart disease increases the risk in pregnancy for both mother

and fetus. Congestive heart failure is a constant threat not only because of the increased burden carried by the prospective mother but also because the blood volume of the pregnant woman rises during pregnancy.

Hypertension. The mother with underlying primary hypertension which remains uncomplicated may go through pregnancy with little additional risk to herself, but with a higher than average expectancy of miscarriage or fetal death. Hypotensive drugs (those which reduce blood pressure) are generally used throughout pregnancy to reduce blood pressure and prevent complications. However, in about one-half of the hypertensive mothers, preeclampsia becomes superimposed. When this occurs, there is a significant increase in risk to both the mother and the fetus. Furthermore, when kidney impairment accompanies hypertension in pregnancy, the prognosis is always serious.

B. **Alimentary Tract and Liver Diseases.**

Acute Appendicitis. Acute appendicitis complicates about one in 1,000 to 1,500 pregnancies, but since the maternal and fetal mortality rates associated with this disease are high, it should be regarded as one of the serious complications of gestation. The risk is greatest in the third trimester and during labor, when the large active uterus interferes with the ability to localize the infection.

Duodenal Ulcer. Peptic ulcer occurs in the portions of the gastrointestinal tract in which the acid pepsin is found. The great majority of such ulcers may be treated medically, and this is particularly true in pregnancy, when many patients experience some relief of symptoms. However, in some instances peptic ulcers are aggravated by pregnancy and, in exceptional circumstances, the safety of the mother and fetus may be seriously jeopardized.

Hepatitis. Hepatitis seems to show a predilection for younger age groups and is not infrequently encountered

in pregnant women. The prejaundice phase is usually characterized by fatigue, malaise, headaches, loss of appetite, nausea, vomiting, dark urine and light stools.

C. **Disorders of the Kidney.** Diseases and inflammations of the kidney are almost invariable aggravated by pregnancy, particularly if hypertension is also present.

D. **Disorders of the Endocrine System.**

Diabetes Mellitus. Diabetes mellitus is known to complicate pregnancy in about one in 100 to 200 mothers; these figures undoubtedly do not include many patients with latent diabetes which escapes recognition in spite of suggested maternal complications and fetal death. Trauma on occasions has been linked with the onset of diabetes, although the physical and emotional blows that preceded the diagnosis of diabetes may have instigated the examinations that uncovered diabetes rather than actually caused the disease. The two most important effects of diabetes on pregnancy are oversized fetuses and fetal death in utero.

Other associated complications include abortion, excess amniotic fluid accumulation, malpresentation, toxemia and fetal malformation. Meticulous management, which includes constant and continuing diabetic supervision, is a basic necessity for diabetic mothers. These mothers must be seen by the physician at frequent intervals throughout pregnancy. Diabetic or obstetric complications may also require prompt hospitalization.

Hyperthyroidism. Hyperthyroidism is an uncommon complication during pregnancy; its estimated incidence is one in 1,000 to 2,000 pregnancies. Nevertheless, management of this disease is important, as hyperthyroid states may have serious effects on both mother and baby.

E. **Respiratory Diseases.**

Common Cold. An acute cold is significant because in many cases it precedes the development of pneumonia. In

the pregnant individual it may complicate the choice of anesthetic or predispose to secondary bacterial invasion, notably by the streptococcus, which increases the risk of fetal infection.

F. **Anemia.** The most frequently encountered complication of pregnancy is anemia. Approximately 60 percent of pregnant women have some degree of anemia. In the United States practically all of the anemia is hypochromic – the iron deficiency variety. The most frequently proposed reason for this hypochromic anemia is a nutritional one, based on the deficiency of iron in the diet. The anemia is more prevalent in low-income groups than in high-income groups. Except in extreme cases this anemia is not attended by severe irreversible organ changes. Moderate to severe anemia from whatever cause significantly increases the risk of infection and the susceptibility of the mother to shock from blood loss, trauma, or anesthesia at the time of delivery.

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III. DISCOMFORTS DUE TO PREGNANCY

A. Weight Gain and Awkwardness

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CERTIFICATE OF SERVICE

Three copies each of the Brief for Petitioners on Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit have been served this 21st day of June, 1973, by depositing same in a United States Mail Box, First Class, postage prepaid, addressed to Jane M. Picker, Lizabeth A. Moody, Rita Page Reuss, and Charles E. Guerrier, 620 Keith Building, 1621 Euclid Avenue, Cleveland, Ohio 44115, Counsel for Respondents, and Lewis R. Katz, 11075 East Boulevard, Cleveland, Ohio 44106, of Counsel for Respondents.

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